

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRD REGION**

**SUNRISE NURSING HOME, INC.**

**Petitioner/Employer**

**and**

**Case 3-UC-511**

**1199 SEIU, AFL-CIO**

**Union**

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Sunrise Nursing Home, Inc., hereinafter referred to as the Employer, and 1199 SEIU, AFL-CIO, hereinafter referred to as the Union, stipulated at the hearing that the Employer operates a skilled nursing and rehabilitation facility located at 17 Sunrise Drive, Oswego, New York. During the past twelve months, the Employer, in conducting its business operations, derived gross revenues in excess of \$100,000, and purchased and received at its Oswego, New York facility, goods and materials valued in excess of \$5,000 directly from points located outside the State of New York. Based on the parties'

stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Employer proposes to clarify a bargaining unit of employees employed at its facility by excluding the job classifications of LPN assistant head nurse and LPN charge nurse on the basis that these are supervisory positions under Section 2(11) of the Act. The Union opposes such clarification and contends that the disputed employees are not statutory supervisors and should thus remain in the bargaining unit. There are approximately ten employees in the classifications the Employer seeks to exclude, and approximately 65 employees currently employed in the bargaining unit.

The Union has been the certified collective-bargaining representative of the Employer's service employees since July 20, 1992. The Employer and the Union have been parties to successive collective-bargaining agreements and, at the time of the hearing, were parties to a collective-bargaining agreement in effect from August 9, 2002 through April 30, 2005. Article 2.3 of the collective-bargaining agreement defines the bargaining unit as:

All full-time and part-time LPN Assistant Head Nurses, LPN Charge nurses, Licensed Practical Nurses, Graduate Practical Nurses, Senior Nurse Aides, Certified Nurse Aides, Orderly/Porter, Physical Therapy Aides, Activities Aides, Cooks, Relief Cooks, Kitchen/Diet Aides/Assistants, Maintenance Workers, Housekeepers, Laundry Aides, Team Leaders, Relief Team Leaders; except casual and temporary employees employed in the foregoing classifications. "Unit Aides" are hereby specially classified in Appendix D as temporary employees.

The parties stipulate, and I find, that the following employees are not included in the bargaining unit herein: Jennifer Rimmel, Director of Nursing; Julianne Rey, RN; Jean Ruggio, RN; Susan Schaeffer, RN; Mary Coleman, LPN day supervisor; Linda Taylor, LPN head nurse; Cheryl Hunter, LPN head nurse; and Karen Ladd, LPN head nurse.

The disputed employees consist of LPN assistant head nurses Laura Snyder, Joann Dickinson, and Ann Perry; and LPNs Pamela Bedford, Beverly Lagor, Seth Mystico, James Rebior, Robin Seamon, Shelly Welsh and Melissa McCrobie.<sup>1</sup>

### **Facts**

The Employer operates a 120-bed, 24-hour skilled nursing care facility in Oswego, New York, where it employs approximately 100 employees and currently cares for 93 residents. The residents are housed in three units designated as Unit A, Unit B and Unit C.<sup>2</sup> Residents normally remain in the same wing of the facility for the duration of their care. Jennifer Rimmel is the Employer's Director of Nursing (DON). She has held this position for approximately four years and has been employed by the Employer for approximately eight years. Rimmel's primary duty is to direct the operation of the Employer's nursing department, which consists of registered nurses (RNs), licensed practical nurses (LPNs) and certified nursing aides (CNAs).

The Employer operates three shifts: 7:00 a.m. – 3:00 p.m. (day shift); 3:00 p.m. – 11:00 p.m. (evening shift); and 11:00 p.m. – 7:00 a.m. (night shift). Rimmel is the most senior member of the Employer's nursing staff at all times. She normally works from

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<sup>1</sup> The Employer contends that all LPNs are charge nurses, including McCrobie, whose title is LPN float staff nurse but who acts as a charge nurse when no other LPN is on duty on the unit to which she is assigned.

<sup>2</sup> C wing currently has the most residents; A wing the least. The level of care is the same in each of the three units, although at times there may be more patients with special needs on one unit than on another.

8:00 a.m. through 4:00 p.m. but she, or one of her designees, are on call 24 hours a day.<sup>3</sup>

In addition to Remmel, nursing staff on the day shift normally consists of Rey, the Employer's assistant director of nursing (ADON), LPN day shift supervisor Coleman, and MDS coordinator Ruggio. There is an LPN head nurse and/or an LPN assistant head nurse on each of the three units.<sup>4</sup> There are three or four CNAs, depending on the number of residents on each unit, who report to the LPN head nurse and LPN assistant head nurse.

There is no ADON, day supervisor or MDS coordinator on either the evening or night shift. While Remmel does not normally work either of these shifts, she might have occasion to be in the building during those two shifts. An RN supervisor works on the evening shift approximately 20 days per month. There is normally no RN on the night shift.

Nursing staff on the evening and night shifts normally consists of one LPN charge nurse on each unit on each shift, two to three CNAs on each unit on the evening shift; and one to two CNAs on each unit on the night shift. LPNs may bid on a position, i.e., shift and unit, at the end of their probationary periods. Once awarded a bid, the LPN routinely works that shift and unit. Positions for assistant head nurse are posted by the Employer pursuant to the terms of the collective-bargaining agreement.<sup>5</sup>

According to the job description contained in the parties' collective-bargaining agreement, LPN responsibilities include performing routine and complex treatments in

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<sup>3</sup> State regulations require that an RN be on call at all times when no RN is in the facility.

<sup>4</sup> The head nurse and assistant head nurse normally rotate so that usually either one or the other is on duty on each unit. In the event that both are on duty on the same unit, the head nurse would be the charge nurse, and the assistant head nurse would act as the staff nurse.

<sup>5</sup> All assistant head nurse positions are scheduled on day shifts, although assistant head nurses may work other shifts for purposes of coverage. The record is unclear as to how often this occurs.

accordance with resident care plans; irrigations; administering medications; taking and recording vital signs and blood pressure readings; collecting specimens; observing, recording and reporting resident conditions and symptoms of change; assisting residents in personal hygiene and activities of daily living; providing for emotional and physical comfort and safety of residents; making beds and changing linens; and cooperating with nursing staff as a team member. The LPN job description states that he/she reports to the head nurse or charge nurse on duty.

The charge nurse job description contained in the collective-bargaining agreement states that the duties of charge nurse include monitoring staff assignments on the shift; implementing and maintaining nursing standards of care; making rounds to observe resident responses and problems; performing required treatments per physician's orders; possibly making out staff assignments including breaks and meals; counting controlled drugs with oncoming and outgoing staff; preparing and administering medications; responding to emergency conditions; cooperating with other members of the nursing staff; accompanying physicians on rounds if needed; attending inservice programs; charting pertinent issues and maintaining day to day charting. The job description mandates that the charge nurse report to the head nurse or supervisor, and prepare monthly summaries if working full-time as a charge nurse.

The job description of the assistant head nurse reiterates the duties of charge nurse and additionally requires that the assistant head nurse prepare monthly summaries and care plans as assigned by the head nurse; maintain up-to-date, accurate records; complete forms and charts as required by medical records; and be able to complete all paperwork

for resident admission and discharge. Like the LPN charge nurse, the job description states that the assistant head nurse reports to the head nurse or supervisor.

LPNs receive LPN pay when working as a staff nurse, and charge pay when working as a charge nurse. It is unclear from the record whether assistant head nurses always receive assistant head nurse pay, or whether they sometimes act as staff LPNs or LPN charge nurses and are paid accordingly.<sup>6</sup>

The head nurses place residents into groups. The groups are then to be assigned to the CNAs by the charge nurse on duty. Charge nurses are expected to fill out a resident assignment sheet after the report meeting at the beginning of each shift.<sup>7</sup> The resident assignment sheet shows which CNAs were assigned to a each group of residents. The LPN charge nurse on the night shift, James Rebior, testified that he does not fill out the daily resident assignment sheet each day. Rebior testified that when he does fill out the resident assignment sheet, he assigns both of the CNAs on duty to all of the residents rather than assigning one group of residents to a particular CNA. According to Rebior, the CNAs on his shift normally work out among themselves which of the residents they want to care for. Pamela Bedford, an LPN charge float nurse on the night shift, testified that she rarely fills out a resident assignment sheet and that CNAs normally split up resident care as they see fit.<sup>8</sup>

Rommel testified that charge nurses assign the groups of residents to the CNAs, although she has heard CNAs discuss among themselves which residents they want to

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<sup>6</sup> The collective-bargaining agreement states that charge pay is Grade 4 LPN pay at the employee's current step plus \$.30 per hour, and assistant head nurse pay is Grade 4 LPN pay at the employee's current step plus \$.70 per hour.

<sup>7</sup> At the report meeting, the shift going off duty reports to the shift coming on duty about items such as changes in residents, injuries, skin tears, temperatures, and the follow-up from a prior incident such as an injury.

<sup>8</sup> No employee who is regularly assigned to the evening shift provided testimony at the hearing.

care for. Remmel testified that CNA trade requests have been denied for purposes of patient care, but she could not recall any specific examples of when this has occurred.<sup>9</sup> Rebior has observed Karen Ladd, day shift head nurse, ask her CNAs which list of residents they were caring for, which led him to conclude that Ladd permits the CNAs to choose the residents themselves. When Rebior has worked overtime on the day shift on C wing, he has observed CNAs rotate groups, i.e., a CNA takes group 2 one week and group 3 the next. With respect to duties like sweeping the kitchen area or cleaning, Rebior has observed Ladd write numbers on a piece of paper and have aides draw from the numbers to get their tasks for the day.<sup>10</sup>

While on duty, charge nurses monitor patient care, administer medications, work on the floor caring for patients, direct and assist CNAs in caring for residents, and ensure that the CNAs perform their assigned tasks. Additionally, charge nurses are responsible for ensuring that all care records have been filled out completely, and that resident care is documented. Remmel testified that charge nurses assign break and meal times to their CNAs at the report meeting, and that CNAs are required to report to the charge nurse before they leave the floor. Rebior and Bedford testified that break and meal times are predetermined and are not assigned. Breaks and meals are sometimes delayed depending on when food trays arrive on the unit or for purposes of coverage. According to Remmel, in these circumstances the charge nurse may advise the CNA to wait before taking the break, but she was unable to recall specific instances when the charge nurse has done so.

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<sup>9</sup> CNAs might seek to trade certain residents in the grouping because of personality conflicts with particular residents. Remmel testified that some residents would rather not have CNAs of a certain gender or ethnicity, and that CNAs might trade under these circumstances as well.

<sup>10</sup> Rebior gave no testimony as to how or whether he assigns these tasks on the night shift.

Typical CNA duties include taking temperatures, emptying Foley bags, checking residents, moving residents, sitting with residents, bathing or showering residents, and getting supplies for the wing. The job description for CNAs, contained in the parties' collective-bargaining agreement, states that CNAs are to follow standard procedures, attend or assist residents in personal hygiene functions including bathing, dressing, eating, toileting, hair and nail care and elimination needs; provide for comfort of residents including changing position, lotioning, massages, incontinent care, and ensuring clean clothing; ensuring beds and linens are clean; preparing soiled linen and clothing for laundering; collecting urine and fecal samples as assigned; charting resident conditions on records; observing and reporting significant changes in residents' conditions; and ensuring safety of residents during emergencies. The job description states that the CNAs report to the head nurse or charge nurse.

CNAs are required to fill out a resident care sheet, a one-page sheet listing every task that needs to be completed for each resident.<sup>11</sup> CNAs initial and check off next to each task, complete the consumption records for each resident they attend to, and document items such as whether the resident was incontinent. The charge nurse is responsible for ensuring that the CNAs complete their tasks and document the care they have provided. If the assistant head nurse or LPN charge nurse sees an unsafe situation, he/she can verbally correct the situation. Rebior testified about an incident where he saw a CNA yanking a wet soaker out from under a resident instead of rolling the resident off and then removing it. According to Rebior, he told the CNA that was unsafe and that it could cause skin tears and that he did not want to see it again.

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<sup>11</sup> The record is silent as to who creates the list of tasks on the resident care sheet for each resident. There is no evidence that the resident care sheet is prepared by an assistant head nurse or an LPN charge nurse.



Rommel testified that assistant head nurses and LPN charge nurses have the authority to discipline CNAs despite the lack of any reference in the job descriptions to discipline. Rommel testified that she has never advised the assistant head nurses and LPN charge nurses that they possess the authority to discipline employees. The record contains two instances where assistant head nurse Laura Snyder disciplined a CNA.<sup>12</sup> In 2003, assistant head nurse Snyder prepared and signed one verbal and one written warning to CNA Bethany Fields for failing to alert the head nurse or assistant head nurse that she was taking a break. The disciplines were signed by Rommel, who is required to sign all disciplinary records before they are placed in the employees' personnel files.<sup>13</sup> Rommel could not recall whether Snyder contacted her or another supervisor and advised that Fields required discipline up before she wrote it up. Rommel testified that the usual course of action when an LPN charge nurse believes that discipline is warranted is to bring the issue to the attention of an RN supervisor, or a head nurse or an assistant head nurse. According to Rommel, there is normally a discussion between the supervisor and possibly the head nurse and the charge nurse. They may or may not speak to the CNA to determine if the discipline is warranted. The record contains no evidence as to whether the Employer conducted an investigation into Fields' conduct before Snyder gave her the discipline.

LPN charge nurse Rebior testified that he is unaware that he has any authority to discipline CNAs. According to Rebior, he is unable to do so because he does not have access to the personnel files and therefore is unable to determine which level of discipline

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<sup>12</sup> There was some confusion in the record as to whether Snyder was acting as an assistant head nurse or an LPN charge nurse at the time of the discipline. Rommel testified that if Snyder administered the discipline, she must have been the charge nurse on duty.

<sup>13</sup> Rommel signed the disciplines using her maiden name, Jennifer Perry.

is warranted.<sup>14</sup> Rebior testified about two instances in which he witnessed CNA misconduct. On one occasion, Rebior walked into a room and saw a resident lying unclothed on an unmade bed. According to Rebior, he advised the CNA that the situation was unacceptable and he then reported the incident to Ladd. The following day, Coleman asked Rebior to write a statement about what he had seen. Neither Coleman nor Ladd asked Rebior whether or what discipline he thought was appropriate and Rebior was never advised as to what action, if any, the Employer took against the CNA.

The second incident occurred in September 2004, when Rebior saw CNA Lindsey LaGull apparently choking a resident with the strings of a gown. Rebior reported the incident to Coleman the following morning. No one asked him whether or what discipline he thought was appropriate and Rebior was never advised as to what action, if any, the Employer took against LaGull.

LPN float charge nurse Bedford testified that on one occasion, she observed that six residents had wet beds, even though the CNA had stated that she had completed her rounds. Bedford asked the CNA to go back and do the beds before she left the building and testified that she reported the incident at the end of her shift. Bedford was never advised as to whether the CNA was disciplined.

Normally, an RN supervisor on duty holds a set of master keys that grants access to restricted areas of the facility, including an office containing physician contact information. If there is no RN supervisor or non-bargaining unit LPN present, the master keys are given to a bargaining unit LPN, who is chosen at Remmel's discretion. LPNs may elect to hold the keys on a voluntary basis; Remmel does not force anyone to do so.

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<sup>14</sup> The collective-bargaining agreement provides for progressive discipline.

An LPN who holds the master keys receives extra pay for doing so.<sup>15</sup> Generally, an LPN holds the keys approximately ten times a month on the evening shift, and approximately 28 times a month on the night shift.<sup>16</sup> New York State regulations require that an RN be on call whenever no RN is on site. The LPN who holds the keys is responsible for contacting the on-call RN if there is a problem. Rimmel testified that while on call, she has received calls regarding things like the death of a resident, a fire alarm, or a fight between CNAs. According to Rimmel, she relies on the person with the master keys to make decisions concerning whether to call a physician, send employees home, or to call the police or the fire department. An LPN who holds the master keys is authorized to send employees home because of illness or family emergency if staffing permits. However, they do not have discretion to send employees home for other reasons. In cases other than illness or family emergency, the LPN must contact the on-call RN for guidance.

There are no written guidelines for holding the master keys, and employees receive no training with respect to this task. Rebior holds the master keys approximately one to two times a week. He has never received any training with respect to the significance of holding the keys, nor has he been given any orientation about holding the keys. According to Rebior, he understands that when he has the master keys, he answers the telephone for employee call-ins on the upcoming shifts, gets equipment for other nurses or aides, calls the physicians if he needs to, contacts the fire department in the event of an alarm, sends people home who request to leave because of illness if staffing

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<sup>15</sup> Rebior testified that on the night shift, he receives \$2.00 an hour above his regular pay when he holds the master keys. The record is silent as to what extra pay, if any, is given to other LPNs or to RNs who hold the master keys.

<sup>16</sup> Thus, on most evening shifts, there is a non-bargaining unit LPN or RN who holds the master keys.

permits, and contacts the DON or RN on call in case of the death of a resident, or if he has another question.

When nursing staff employees call off work for the oncoming shift, the person holding the master keys is responsible for attempting to find a replacement.<sup>17</sup> If there is a need for nursing staff to remain at work to cover a staffing shortage, Rebior stated that he seeks volunteers, but that he has no authority to mandate employees to work overtime. If Rebior cannot obtain a volunteer, he calls the DON or the RN on duty and they decide which employee must stay. Rebior then relays their decision to the affected employee. Rebior testified that he has shifted employees from one unit to another in an attempt to provide staffing coverage when an employee calls off or leaves early because of illness or family emergency, but that the day supervisor has overridden his decision to do so on at least one occasion.

Rebior stated that when he has the master keys, he is responsible for contacting a physician if the need arises, because the keys provide access to the room containing the physician contact information. According to Rebior, other LPNs not holding the master keys have authority to contact physicians as well. Rebior testified that on one occasion when he was not holding the keys, he used his cell phone to contact a physician. Rebior has never held the master keys during a fire alarm, but his understanding is that the person with master keys is responsible for calling 911 or ensuring that someone else contacts 911. Pamela Bedford, float charge nurse, testified that when Rebior has the keys, it is her understanding that she is to report to him anything unusual because he carries the clipboard that contains a list of what is happening on each floor. Bedford

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<sup>17</sup> If the call off is from another department, the LPN with the master keys writes a note and leaves it in an appropriate location, i.e., notes regarding call-offs from dietary are posted on the kitchen door.

stated that she would report incidents such as whether a resident had a temperature, a skin tear, or had fallen.<sup>18</sup>

It is undisputed that assistant head nurses and charge nurses have no authority to hire, fire, suspend, lay off, recall, promote, discharge, adjust grievances, or to provide employees with financial or monetary awards, or to effectively recommend such actions. Remmel testified that an assistant head nurse or an LPN charge nurse could transfer a CNA to another wing while they were holding the master keys for purposes of coverage. The assistant head nurses and LPN charge nurses do not have the authority to transfer CNAs from one job to another, such as transferring a CNA to work in the dietary department. There is no evidence in the record that assistant head nurses or LPN charge nurses can permanently transfer CNAs to another unit or shift.

### **Analysis**

Based on the record herein, I find that the Employer has not met its burden in demonstrating that assistant head nurses and LPN charge nurses are supervisors as defined by Section 2(11) of the Act.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The statutory indicia contained in Section 2(11) of the Act are listed in the disjunctive. Consequently, only one indicia need be present in order to confer

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<sup>18</sup> The record testimony does not explain what happens upon the report of such information.

supervisory status on an individual. See, e.g., Phelps Community Medical Center, 295 NLRB 486, 489 (1989); Ohio River Co., 303 NLRB 696, 713 (1991); Opelika Foundry, 281 NLRB 897, 899 (1986); Groves Truck & Trailer, 281 NLRB 1194, n. 1 (1986). However, mere possession of one of the statutory indicia is not sufficient to confer supervisory status unless such power is exercised with independent judgment and not merely in a routine or clerical manner. Hydro Conduit Corporation, 254 NLRB 433, 437 (1981).

Section 2(11) of the Act sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if they hold the authority to engage in any one of the 12 indicia listed in the statute; their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and their authority is exercised “in the interest of the employer.” NLRB v. Kentucky River Community Care, Inc., et al., 532 U.S. 706, 712 - 713 (2001).

The burden of proving supervisory status lies with the party asserting such status. See, e.g., Kentucky River, *supra*; Michigan Masonic Home, 332 NLRB 1409 (2000). Lack of evidence, or conflicting or inconclusive evidence, is construed against the party making the assertion. *Id.* “Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” Phelps Community Medical Center, 295 NLRB at 490. Mere inferences or conclusory statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. See Sears, Roebuck & Co., 304 NLRB 193 (1991).

In the instant case, the Employer asserts that the assistant head nurses and LPN charge nurses are supervisors based on their authority to 1) direct the work of CNAs; 2) discipline CNAs; and 3) transfer CNAs, or to effectively recommend such actions to the Employer.

#### Direction of work

With respect to the Employer's contention that assistant head nurses and LPN charge nurses direct the work of CNAs, the record evidence demonstrates that the assistant head nurse and LPN charge nurse on each unit is responsible for ensuring that the CNAs perform patient care duties as set forth in the resident care sheets, and that CNAs have completed the consumption and output records for the residents. If a CNA does not complete a required task, the assistant head nurse or LPN charge nurse can request that the CNA do so. The assistant head nurse or LPN charge nurse can also direct a CNA to take temperatures more frequently, get supplies as needed, sit with a resident who needs extra care, or perform additional care for residents who may have special needs due to injury or illness. There is no evidence in the record that assistant head nurses or LPN charge nurses can direct CNAs to perform duties other than those duties that they are normally responsible for. There is also no evidence in the record that charge nurses assign duties to CNAs based on any independent assessment of a particular CNAs training or ability.

In Ten Broeck Commons, 320 NLRB 806 (1996), the Board considered whether charge nurses in a nursing home responsibly directed the work of aides in such a manner as to confer supervisory status on the charge nurses. In that case, the Board noted that the essential duties of the aides were to care for the elderly, and that each day, the aides were

responsible for performing the same care in the same manner for the same people. The aides were responsible to consult with an aidex and perform all functions indicated for each resident.<sup>19</sup> Although the charge nurses at issue in that case were responsible for ensuring that the aides performed the duties, the Board noted that “[t]his type of direction does not require the independent judgment of Section 2(11).” Id. at 810.

[T]he LPNs’ supervision of CNAs is narrowly circumscribed to giving rather general, routine directions to lesser skilled employees in order to maintain the quality of their work. This type of authority is typical of that of the industrial strawboss and leadman, skilled employees with only limited authority, who are routinely excluded from the definition of supervisor.

Id. at 811 – 812, citing Beverly Manor Convalescent Center, 275 NLRB 943, 947 (1985).

As in Ten Broeck, the LPN assistant head nurses and LPN charge nurses in the instant case merely ensure that CNAs adequately perform duties that are pre-assigned to them by the Employer. The record contains no evidence that the charge nurses exercise any genuine prerogative in assigning tasks. As the Board stated in Franklin Home Health Agency, 337 NLRB 826, 830 (2002), a post-Kentucky River case:

Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an Employer’s set practice, pattern or parameters, or based on such obvious factors as whether an employee’s workload is light, does not require a sufficient exercise of independent judgment to satisfy this statutory definition. See Express Messenger Systems, 301 NLRB 651, 654 (1991); Bay Area-Los Angeles Express, 275 NLRB 1063, 1075 (1985).

See also Beverly Health & Rehabilitation Services, 335 NLRB 635, fn. 3 (2001) (LPNs at nursing home who directed other employees to take temperatures, vital signs and monitor

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<sup>19</sup> The aidex appears to be similar to the resident care sheet utilized by the CNAs in the instant case.



fluids exercised only routine authority that did not require the use of independent judgment within the meaning of Section 2(11) of the Act). Further undercutting any argument that the disputed LPNs are statutory supervisors is the lack of any evidence that the assistant head nurses or LPN charge nurses are held accountable for the work of the CNAs. See Franklin Home Health Agency, 337 NLRB at 831 (Board considers evidence as to whether alleged supervisors are held accountable for the performance and work product of employees they direct, citing, Schnurmacher Nursing Home, 214 F.3d 260, 267 (2d Cir. 2000).

With respect to the Employer's argument that charge nurses schedule breaks and meal times, the evidence demonstrates that the number and length of breaks is set forth in the collective-bargaining agreement and the record contains no evidence that the charge nurses have any authority to make changes to the Employer's break policy. Rather, it appears from the record that the CNAs routinely take their breaks around the resident care schedule, i.e., such as when the meal trays are delivered to the floors or when bed check is completed. While the record contains no specific instances of charge nurses making adjustments to break schedules, I note that even if such evidence were contained herein, the adjustment of break schedules as alleged by the Employer, without more, is routine and does not require the use of independent judgment sufficient to confer supervisory status. See Providence Hospital, 320 NLRB 717, 732 (1996). See also Loyalhanna Care Center, 332 NLRB 933, 935 (2000) ("the determination of breaktimes based on resident needs does not require independent supervisory judgment.")

The Employer argues that the assistant head nurses and LPN charge nurses are supervisors because they hold the master keys to the facility and are thus the highest

ranking employees present at the facility approximately 42 percent of the time. I note that a disputed individual's status as the highest ranking on-site employee is secondary indicia and, in the absence of evidence of primary indicia, is not determinative of Section 2(11) supervisory status. See, e.g., S.D.I. Operating Partners, 321 NLRB 111, fn. 2 (1996). Thus, in order to determine whether supervisory status is established by virtue of the fact that the disputed LPNs are the highest-ranking employees in the facility for significant periods of time, I must first examine whether the LPNs possess any of the statutory indicia set forth in Section 2(11) of the Act while they hold the master keys.

As an initial matter, a bargaining unit LPN only holds the keys in the absence of an RN supervisor or non-bargaining unit LPN. At such times, either DON Remmel or the RN supervisor are always on call. The LPN holding the keys is instructed to contact them in the event of an emergency, or for any situation in which they have no authority to resolve on their own. Merely notifying a supervisor of an emergency or unusual situation, without exercising independent discretion in resolving a situation, is insufficient to confer supervisory status. Chevron Shipping Co., 317 NLRB 379, 381 (1995); Springfield Jewish Nursing Home for the Aged, Inc., 292 NLRB 1266, 1267 (1989). See also Loyalhanna Care Center, supra at 936 (being the highest ranking on-site employee does not confer supervisory status, particularly where the record demonstrates that a stipulated supervisor is on call).

To the extent that the record contains evidence that the LPN holding the master keys has the discretion to call a physician, it appears from Rebior's testimony that any LPN has the authority to contact the physician, but that the LPN with the keys normally does so because he/she is the one with access to the room containing the physician

contact information.<sup>20</sup> See, e.g., Bozeman Deaconess Hospital, 322 NLRB 1107 (1997) (RN charge nurses with authority to call physicians not statutory supervisors). There is no evidence to show that the key holder has the authority to direct someone else to call a physician. With respect to the Employer's contention that the LPN with the keys can call CNAs in to work, ask employees to remain on duty, and/or shift CNAs to another unit, I note that the LPN can only solicit CNAs to provide coverage on a voluntary basis. The shifting of CNAs to another unit for purposes of resident coverage is routine and requires no discretion on the part of the charge nurse. Calling employees in, or randomly selecting employees to cover a shift, is insufficient to confer supervisory status in the absence of any evidence that the alleged supervisory employee has the authority to mandate that employees come in to work or work overtime.

In Washington Nursing Home, Inc., 321 NLRB 366 (1996), the Board adopted the findings of the administrative law judge that LPN charge nurses were not supervisors. In that case, the record demonstrated that charge nurses had the authority to ask an aide to stay over for an entire shift, or until a replacement arrived, to ensure adequate coverage. There was no evidence that the charge nurses could require an aide to stay past the end of his/her shift. Charge nurses also had the authority to call off-duty aides to determine whether they wanted to come in for a shift. The administrative law judge concluded, and the Board agreed, that such authority was insufficient to render the charge nurses statutory supervisors. *Id.* at 370. See also Riverchase Health Care Center, 304 NLRB 861, 864 (1991) (the Board found that nurses exercised only routine judgment to select replacements at random from a list of candidates established by the employer.)

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<sup>20</sup> As noted above, Rebior testified that when he was not holding the keys he called a physician on his cell phone.

The Employer further argues that the LPN who holds the keys has authority to send employees home in the event of illness or emergency. The record shows that it is unsafe for residents to be cared for by a sick employee, and the LPN with the master keys is only permitted to allow an employee to go home for purposes of illness or family emergency, and if there is adequate staffing. There is no evidence in the record that the LPN with the keys has any discretion in deciding whether a CNA can leave prior to the end of his/her shift outside of these parameters. Rather, it appears from the record that the LPN uniformly allows employees to leave for the afore-stated reasons if coverage permits. In other instances, the LPN is instructed to contact Remmel or the RN supervisor for further instructions.

In Millard Refrigerated Services, Inc., 326 NLRB 1437 (1998), the Board reversed the finding of the hearing officer that the ability to send employees home for lack of work was evidence of supervisory authority as contemplated by Section 2(11) of the Act. In that case, two individuals were authorized to send forklift operators home when it was clear that their services would not be needed by the Employer for the remainder of the day. The Board found that the decision to send employees home was based solely on the observation that there is no other work to be done, and does not involve the use of independent judgment.

The evidence in the instant case demonstrates that the assistant head nurse or LPN charge nurse with the keys is permitted to send a CNA home at his/her request if staffing permits only if there is a family emergency or if the employee is ill. Otherwise, he/she must contact the RN supervisor on call. In the absence of any evidence that the LPN exercises any discretion with respect to employee requests to leave because of illness, I

find such authority insufficient to confer supervisory status. See J.C. Brock Corporation, 314 NLRB 157, 160 (1994)(the “authority to permit an employee to leave work early in the case of an emergency is not determinative of supervisory status.”) See also Loyalhanna Care Center, 332 NLRB at 935 (“[T]here does not appear to be any substantial degree of judgment involved in permitting an employee who is too ill to work, or one who experiences a family emergency, to go home.”); Wilshire at Lakewood, 343 NLRB No. 23 (September 30, 2004) (no supervisory authority where alleged supervisor merely voiced agreement with employees’ own assessment of need to leave early in the absence of evidence of independent judgment).

In its post-hearing brief, the Employer relies on Beverly Enterprises, Virginia, Inc. v. NLRB, 165 F.3d 290 (4<sup>th</sup> Cir. 1999) in support of its position that the LPNs in the instant case are Section 2(11) supervisors. I find the facts of that case distinguishable from those contained herein. In Beverly, the disputed LPNs had authority to send employees home for misbehavior, and to effectively recommend suspension and discharge. Additionally, the LPNs in Beverly filled out daily assignment sheets for the aides instructing them on the work they were to complete that day, had authority to adjust nursing assistants' work schedules, and could decide whether it was necessary to call in a replacement nursing assistant. In the case of an emergency, a charge nurse could order an evacuation of the nursing home and direct that evacuation.

The record in the instant case fails to establish that the disputed LPNs hold the same authority relied on by the court in Beverly. Rather, I agree with the Union that the evidence fails to demonstrate that assistant head nurses and LPN charge nurses exercise the sort of independent judgment in carrying out their duties envisioned by Section 2(11)

of the Act. “Only individuals with ‘genuine management prerogatives’ should be considered supervisors as opposed to ‘straw bosses, leadmen, . . . and other minor supervisory employees.’” Armstrong Machine Company, Inc., 343 NLRB No. 122, fn. 4 (December 16, 2004), quoting Chicago Metallic Corp., 273 NLRB 1677, 1688 (1985).

In the absence of evidence that the LPN charge nurses possess any of the primary indicia of supervisory status set forth in Section 2(11) of the Act while they hold the master keys, I find that the mere fact that LPN charge nurses are the highest ranking employees on site at the Employer’s facility during the majority of the evening and night shifts insufficient to confer supervisory status.

When there is no evidence presented that an individual possesses any of the several primary indicia of statutory supervisory status enumerated in Section 2(11) of the Act, secondary indicia are insufficient by themselves to establish supervisory status.

Ken-Crest Services, 335 NLRB 777, 779 (2001).

#### Authority to discipline

I find that the Employer has not met its burden in demonstrating that the assistant head nurses and LPN charge nurses have the authority to discipline CNAs, or to effectively recommend such discipline. As evidence that the LPN charge nurses have the authority to discipline employees, the Employer introduced two examples of discipline by an assistant head nurse. However, the Employer provided no evidence with respect to the circumstances involving the discipline. Rimmel could not recall whether the assistant head nurse discussed the incidents with her prior to writing up the discipline, and there is no evidence in the record as to any autonomy possessed by the assistant head nurse in administering the discipline. The record evidence does not establish whether she took it

upon herself to issue discipline, or whether she did so at the behest of an individual with undisputed supervisory authority. The lack of evidence in the record regarding the assistant head nurse's involvement in the discipline must be construed against the Employer as the party asserting supervisory status in this work classification. See Valley Slurry Seal Co., 343 NLRB No. 34 (September 30, 2004). See also Dynamic Science, Inc., 334 NLRB 391, 393 (2001) ("Conclusory evidence, 'without specific explanation that the [disputed person or classification] in fact exercised independent judgment,' does not establish supervisory authority.")

The weight of the evidence contained in the record fails to demonstrate that assistant head nurses and LPN charge nurses have the authority to discipline employees. Nothing in the job descriptions of the assistant head nurses or LPN charge nurses grants to them the authority to issue discipline and Remmel testified that she has never told these individuals that they hold such authority. LPN charge nurses Rebior and Bedford testified that they do not believe that they have the authority to discipline employees, and neither charge nurse has issued discipline to a CNA.

Further, there is no evidence in the record that the disputed LPNs can effectively recommend discipline. Rebior testified about two incidents wherein he merely reported CNA misconduct and on neither occasion was Rebior asked for his input as to whether, or the degree to which, discipline would be appropriate. Bedford was not asked as to whether she believed discipline was appropriate on the one occasion that she reported a CNA for misconduct. In the absence of any evidence of specific instances where the disputed LPNs have disciplined employees on their own initiative, or have effectively recommended discipline, I conclude that, at best, the role of the disputed LPNs with

respect to discipline is merely reportorial and thus not indicative of supervisory status. Loyalhanna Care Center, 332 NLRB at 934; Ten Broeck Commons, 320 NLRB at 812; Illinois Veterans Home, 323 NLRB 891, 891 (1997); Passavant Health Center, 284 NLRB 887, 891 (1987). Cf. Mountaineer Park, Inc., 343 NLRB No. 135 (December 16, 2004)(authority to effectively recommend discipline present where evidence demonstrated three to five instances where disputed individual recommended discipline and the employer conducted no independent investigation and followed the recommendation in all instances.)

#### Authority to transfer

Finally, the Employer argues that the disputed LPNs have the Section 2(11) authority to transfer employees from one unit to the other. DON Rimmel testified that LPNs have no authority to transfer CNAs from one job classification to another, and there is no evidence that the disputed LPNs can permanently transfer CNAs to another unit. The record contains undisputed evidence that the LPN holding the master keys can temporarily transfer CNAs from one unit to another in order to provide coverage in the event that a CNA either calls in sick or leaves work early due to illness. On at least one occasion, the day shift supervisor overrode the decision of Rebior to place a CNA on A wing.

The mere fact that the LPN holding the master keys can temporarily shift a CNA from one unit to another to provide coverage is insufficient to confer supervisory status. Rather, the evidence demonstrates that such transfers are based on nothing more than an assessment of the number of CNAs needed to serve a particular number of residents. Such assignment is routine in nature and not indicative of Section 2(11) supervisory



status. “Such authority to ask for or to make temporary reassignments between wings to meet obvious staffing needs is limited in scope and practice and ‘is not significantly more complicated than counting’ the number of employees available.” Loyalhanna Care Center, 332 NLRB at 935, quoting, Providence Hospital, 320 NLRB at 732.

### **Conclusion**

Based on the record herein, I find that the Employer has not met its burden in demonstrating that the LPN assistant head nurses and LPN charge nurses responsibly direct the work of other employees, have the authority to discipline or effectively recommend discipline, or the authority to transfer or effectively recommend the transfer of bargaining unit employees. In the absence of such evidence, or evidence of the exercise of any other supervisory indicia, supervisory status has not been established.

Accordingly, I find that the Employer’s request for clarification of the bargaining unit to exclude the LPN assistant head nurses and LPN charge nurses is denied, and that the petition is dismissed.

### **ORDER**

**IT IS HEREBY ORDERED** that the unit clarification petition be, and hereby is, dismissed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **June 16, 2005**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file a request for review of this Decision electronically, please refer to the attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: [www.nlrb.gov](http://www.nlrb.gov).

**DATED** at Buffalo, New York this 2<sup>nd</sup> day of June, 2005.

/s/Rhonda P. Aliouat

**RHONDA P. ALIOUAT,**

Acting Regional Director

National Labor Relations Board – Region 3

Thaddeus J. Dulski Federal Building

111 West Huron Street - Room 901

Buffalo, New York 14202